

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

UNITED AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS  
OF AMERICA, UAW, LOCAL NO. 2333  
(B.F. Goodrich Aerospace Landing Gear  
Division of the B.F. Goodrich Company)

and

Case 8-CB-9023 (E)

DAVID SMITH, An Individual

*Tom Randazzo, Esq.*, for the General Counsel.  
*Bryan O'Connor, Esq. (Joyce Goldstein &  
Associates)*, of Cleveland, Ohio, for the  
Respondent.  
*David Smith*, of Parma, Ohio, for the Charging  
Party.

SUPPLEMENTAL DECISION

EQUAL ACCESS TO JUSTICE

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. On May 30, 2003, the National Labor Relations Board (the Board) affirmed my decision in the above-captioned case (339 NLRB No. 20). I found that United Automobile, Aerospace and Agricultural Implement Workers of America, Local No. 2333 (the Respondent), did not violate Section 8(b)(1)(A) of the National Labor Relations Act (the Act) regarding its treatment of unit member and Charging Party herein, David Smith, and dismissed the complaint in its entirety.

On June 23, 2003, the Respondent filed with the Board an application for attorney's fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. Section 504 (EAJA), and Section 102.143 of the Board's Rules and Regulations. On June 25, 2003, the Board issued an Order referring the matter to me for appropriate action. The General Counsel filed a motion to dismiss the application on August 1, 2003; on August 12, 2003, the Respondent filed its response thereto. The Respondent seeks legal fees and expenses in the amount of \$17,320.00 and \$1,965.85, respectively, totalling \$19,285.85. The General Counsel contends that the Respondent is not entitled to an award under EAJA because in spite of the Respondent's having fully prevailed at the hearing, both the issuance and prosecution of the complaint were substantially justified, as was his subsequent filing of exceptions to my decision.

On consideration of the entire record in this supplemental proceeding, including the record in the underlying unfair labor practice case, I make the following findings and conclusions of law and order.

5 *A. Equal Access to Justice Act Applied*

EAJA, as applied through Section 102.143 of the Board's Rules and Regulations, provides that the respondent "in an adversary adjudication who prevails in the proceeding, or in a significant and substantive portion of that proceeding" may apply for an award of fees and  
10 expenses incurred in the proceeding. To be eligible for an award, respondents must meet certain eligibility requirements pertaining to net worth, corporate organization, and number of employees.

Once an eligible respondent files for an award, the burden of proof is on the General  
15 Counsel to demonstrate that the Agency's position in each stage of the adjudication, including issuing and prosecuting the complaint as well as filing exceptions to the judge's decision, was substantially justified. In *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), the Supreme Court ruled that "substantial justification" as applied in an EAJA proceeding means "justified to a degree that could satisfy a reasonable person" or having "a reasonable basis both in law and  
20 fact."<sup>1</sup> Another basis for substantial justification exists where credibility findings are critical in resolving the case. *David Allen Co.*, 335 NLRB 783 (2001).

*B. The Respondent's EAJA Application*

25 In the instant application, the Respondent submits that at the hearing, the General Counsel offered absolutely no evidence to support what it views as the complaint's "core" allegation; that is, that the Respondent failed and refused to accept and process Smith's grievance concerning his layoff by the B.F. Goodrich Aerospace Landing Gear Division of the B.F. Goodrich Company (the Employer) because Smith refrained from engaging in union  
30 activities in violation of its duty to fairly represent him. The Respondent also notes that the General Counsel's exceptions to my decision filed with the Board did not include any argument or make reference to any evidence at trial that would support these pertinent complaint allegations.<sup>2</sup> The Respondent essentially submits that since the General Counsel, from his opening statement to the filing of exceptions on appeal,<sup>3</sup> never adduced any evidence that  
35 Smith's union activities motivated the Respondent not to accept or process his grievance. The Respondent argues that this omission strongly suggests that there never was any such evidence to support the charges against which, nonetheless, it was compelled to defend.

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45 <sup>1</sup> The Supreme Court cites the source of that definition as a "Committee Report prepared at the time of the original enactment of the EAJA." The Report set forth "[t]he test of whether the Government position is substantially justified [as being] one of reasonableness in law and fact." H.R. Conf. Rep. No. 96-1434, p. 22 (1980).

<sup>2</sup> These allegations regarding this charge are set out in paragraphs 6(C) and (D) of the complaint.

50 <sup>3</sup> I have not been provided copies of the parties' exceptions filed with the Board. However, the General Counsel does not take issue with this assertion; therefore, I will accept this point as true.

The Respondent asserts thus that since there was no evidence adduced to support the charge there was not a reasonable basis in law and fact to justify the core charges.

The Respondent also contends that the General Counsel advanced other arguments not  
 5 pled in the complaint and thereby forced it to address and present evidence concerning these  
 unpled theories. The Respondent submits that in failing to pursue the theory undergirding the  
 complaint charges and pursuing theories not contained in the original complaint, or added  
 thereto by timely amendment, the General Counsel has not established substantial justification  
 for the litigation.<sup>4</sup>

### 10 *C. The General Counsel's Motion to Dismiss*

The General Counsel submits, first, that the complaint accurately and sufficiently pled  
 15 the allegations of wrongful conduct by the Respondent and adequately notified the Union that it  
 was being charged with refusing to accept and process Smith's grievance for reasons that were  
 unfair arbitrary, invidious, and in breach of its duty of fair representation. The General Counsel  
 contends, second, that the complaint was based on significant evidence that, if credited, would  
 have established the charges.

20 The General Counsel argues that the evidence adduced at trial showed that Smith was  
 protected from layoff in the past by his union representative based on the agreed-upon hire date  
 criterion and the then pertinent contract clauses. He contends in this regard that the failure to  
 process Smith's grievance was contrary to past practices treating with the layoff issue.

25 The General Counsel also contends that there was sufficient evidence that the  
 Respondent's failure to process Smith's grievance was based on his activities as a manager  
 and because the current union officials disliked him. The General Counsel submits that if these  
 reasons were credited, this would support, reasonably, an inference that the Respondent failed  
 to act on Smith's grievances for unfair, arbitrary, and invidious reasons in breach of its fiduciary  
 30 duty.

For these reasons, the General Counsel argues that he had substantial justification and  
 a reasonable basis in law and fact in issuing the complaint, prosecuting the case, and filing  
 exceptions.

### 35 *D. Decisional Background*

David Smith began his employment with the Employer in March 1978. Smith had  
 40 primarily been a unit employee and continuously employed in various departments of the  
 Company's functions. However, during the period of 1979 through 1984, Smith was employed  
 as a maintenance supervisor. In 1984, Smith returned to an hourly status with an adjusted  
 (unit) seniority date of October 11, 1982. Smith's employment with the Employer had been  
 interrupted by two layoffs over time. The first period was a layoff from June 7, 1994, through  
 September 8, 1997, and the second October 22, 1999, through April 24, 2000. The October 22,  
 45 1999 layoff formed the basis for this litigation.

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4 The Respondent contends that it is irrelevant that the General Counsel followed the  
 Board's Pleading Manual for violations of Section 8(b)(1)(A) of the Act. I agree. For purposes  
 50 of EAJA, in my view, it is not the "form" of the complaint that controls or has much bearing at all  
 on the merits of an application for fees and costs.

Certified collective-bargaining representatives have represented unit employees like Smith since about 1979, up to present. During 1979 though 1991, the Aerol Aircraft Employees' Association (AAEA), an independent union, represented unit employees. The Respondent has represented the unit from 1991 to the present.

On October 22, 1999, Smith received official notice of his layoff from the Employer. Smith addressed this matter with a representative of the Respondent and requested that a grievance be filed. On about November 22, 1999, Smith received a letter from the Respondent advising him that it was not going to file his grievance because after investigation, it was determined that there was no violation of the collective-bargaining agreement. Further, the Respondent advised that his layoff was justified by his 1982 adjusted seniority date.

The complaint in this matter was issued on August 18, 2000, charging a violation of Section 8(b)(1)(A) of the Act by virtue of the Respondent's alleged refusal to accept or process his grievance.

#### *E. Analysis and Discussion*

Two preliminary observations. First, it should be noted that, as I stated in my decision, the complaint in question alleged essentially that the Respondent failed and refused to accept and process Smith's grievance because he refrained from engaging in union activities and that the failure and refusal to process the grievance was based on reasons that were unfair, arbitrary, and invidious in breach of the Union's fiduciary duty to Smith. Therefore, in my view, there were two significant components to the charges in question. This is a significant point which influenced my decision not to grant the Respondent's motion to dismiss at the conclusion of the government's case in chief.

However, the Respondent is quite correct regarding the total failure on the General Counsel's part to establish the charge that Smith's refraining from union activities was the motivation for the Respondent's not accepting or processing Smith's grievance.

On the other hand, the General Counsel clearly adduced evidence—union past practices regarding layoff and seniority and union officials' dislike for Smith—that, as noted, if credited (believed by me), could form the basis of a violation of the Act.

The Respondent stakes its claim for an award on what it described as the government's failure to establish the "core" charge. However, I do not accept that characterization; in my view, the charges, while separate, are nonetheless condign. The question is whether both charges meet the substantial justification standards. Second, there is the matter of credibility and the place this concept has in my rendering of the decision in question.

The Board, in affirming my decision in a footnote,<sup>5</sup> stated, ". . . We find that the judge made credibility findings necessary for the resolution of the legal issue, of whether [the Respondent] violated Section 8(b)(1)(A) by refusing to accept and process [Smith's] grievance." The General Counsel in the instant motion contends that I was overruled by the Board regarding my credibility findings. I disagree with his assertion and wholly agree with the Board. I note that there may have been some misunderstanding created by my choice of language—"Credibility, in my view, was not of much moment in my assessment of the merits of each party's claim." By this statement, I meant that no one witness' testimony was more believable than that of another. In so many words, in my view, each witness testified with apparent sincerity and was not

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<sup>5</sup> See fn. 2 of the decision.

contradicted by other credible evidence of record. I concluded, on balance, each testified forthrightly. Notably, Chairman Battista correctly noted in the decision that, in essence, the General Counsel failed in his burden to establish by the preponderance of the credible (testimonial) evidence the violation. Therefore, for purposes of this EAJA claim, it is clear that I made credibility findings in resolving the issues at the trial before me and that, on balance, the witnesses for each side were equally credible in my view. Thus, I would agree with the General Counsel that credibility findings on my part were critical to the resolution of at least one component of the charges.

## Conclusions

I made very clear in my decision that the General Counsel adduced at trial absolutely no meaningful evidence to show that the Respondent's failure to accept or process Smith's grievance was based on or connected to his having refrained from engaging in union activities. The Respondent, in my view, was forced to defend (and expend resources) to defend against what amounts to a phantom charge. Even here, in the context of this EAJA application, the General Counsel offers nothing by way of a defense to his failure to adduce evidence on the refraining from union activities component. I firmly believe the Respondent deserves to be compensated for fees and costs relative to this charge.

On the other hand, the General Counsel, has, in my mind, demonstrated to me that at each stage of the proceedings—issuing and prosecuting the complaint, as well as filing exceptions to my decision—that he was substantially justified in pursuing the complaint allegations relating to a possibly unfair, arbitrary and invidious motive to the failure by the Respondent to handle the grievance in question. Here, credibility made the difference in my resolution of the charges. The Respondent is not, therefore, entitled to an award as to this aspect of the litigation.

Accordingly, I would find and conclude that the General Counsel had no substantial justification for issuing and prosecuting the complaint as well as filing exceptions to that aspect of the complaint relating to the failure by the Respondent to accept or process Smith's grievance because he refrained from engaging in union activities. The aforementioned stages constitute significant and discrete portions of the proceedings within the meaning of Section 102.143(b) of the Rules and Regulations. *Meaden Screw Products Co.*, 336 NLRB 298 (2001).<sup>6</sup>

The Respondent has therefore shown that it meets all of the eligibility requirements for relief under EAJA. I also conclude that the Respondent is entitled to the legal fees and expenses it incurred in processing its EAJA application.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

<sup>6</sup> I would find and conclude also that no special circumstances make an award unjust.

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The General Counsel shall pay to the Respondent \$8,660.00 as legal fees and \$982.92 as expenses, totalling \$9,642.92 computed as of June 25, 2002.<sup>8</sup>

Dated, Washington, D.C. November 26, 2003

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Earl E. Shamwell Jr.  
Administrative Law Judge

<sup>8</sup> I have arrived at this award amount by an admittedly unscientific method, namely by simply dividing the Respondent's claimed fees and costs in half and allocating equal amounts of the associated fees and costs to each of what I deem to be two separate charges for purposes of this EAJA application. I believe it unrealistic and uneconomical to require the Respondent to attempt to determine how much time and resources were devoted to the defense of one specific charge *vis-a-vis* the other in this case.